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No. 84-1002

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,
v.
DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

(PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-in-Interest.)

REPLY BRIEF FOR UNITED TELECOMMUNICATIONS, INC., ET AL.

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1. The Solicitor General's reliance on *General Telephone v. EEOC*, 446 U.S. 318 (1980), is misplaced. The Solicitor General states that *General Telephone* established that the EEOC has "the authority to seek class-wide relief" (Sol. Op. Cert. 10, 12); that *General Telephone* does not suggest that a different rule applies "because the Commission has chosen to intervene in a private Title VII action, rather than to bring a direct suit" (Sol. Op. Cert. 10-11); and that "Petitioner's real complaint . . . is not with the Court

of Appeals' decision, but is with this Court's decision in *General Telephone Co. v. EEOC, supra*" (Sol. Op. Cert. 13). By thus embracing *General Telephone*, the Solicitor General not only misapprehends the narrow ruling there set forth, but he beclouds the issue before the Court in this case.

First, as is pointed out in Petitioners' certiorari petition, pages 6-7, and as the Solicitor General does not deny, the EEOC never investigated the claims contained in Hoffman's charge of employment discrimination, never issued a "reasonable cause" finding, and never attempted conciliation within Title VII's meaning. Quite to the contrary, the decision in *General Telephone* is predicated on a different premise. Thus: "After investigation, the EEOC found reasonable cause to suspect discrimination against women and in April 1977 brought suit. . . ." *General Telephone Co. v. EEOC, supra*, 446 U.S. at 320. As it cannot here be asserted that the EEOC's effort to obtain class relief followed "after investigation" by the EEOC of Hoffman's class-wide claims or after a "reasonable cause" finding by the EEOC with respect to such claims, the emphasis the Solicitor General gives to *General Telephone* is singularly inappropriate. As was stated by this Court, "[c]ritical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation and persuasion before . . . the Commission may bring suit." *W.R. Grace & Company v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, —— U.S. ——, 76 L.Ed.2d 298, 310 (1983).

Second, the Solicitor General's reliance on *General Telephone* ignores the fact that *General Telephone*

reflects a split decision by a majority of five Justices (Justices White, Brennan, Stewart, Marshall and Blackman), with four Justices (The Chief Justice and Justices Powell, Rehnquist, and Stevens) holding the view that the EEOC should have been required to seek class certification under Rule 23 of the Federal Rules of Civil Procedure in order to maintain that suit. *General Telephone*, therefore, is hardly a prop sturdy enough to warrant its extension to a situation that is markedly different both factually and substantively.

2. The Solicitor General argues that, because Congress did not draft the intervention provision of Section 706(f)(1) to parallel the direct suit component of that section, it must therefore be concluded that "Congress expressly authorized the procedure followed by the EEOC in this case" (Sol. Op. Cert. 10). The Solicitor General's argument cannot be reconciled, however, with the fact that when Congress wished to authorize the government to exercise full enforcement power as an intervenor under the Civil Rights Act of 1964 express statutory language was crafted to communicate that intention.

Thus, in contrast to the intervention provision of Section 706(f)(1) of the Civil Rights Act of 1964, which grants the EEOC the limited right to apply for permissive intervention, Section 902 of the same Act allows the Attorney General to intervene *as of right* in private actions seeking relief from denial of equal protection of laws under the Fourteenth Amendment. 42 U.S.C. § 2000h-2. More importantly, Section 902 further states: "*In such action the United States shall be entitled to the same relief as if it had instituted the action*" (emphasis added). Significantly, it

is this latter explicit language which has been held to permit the government (1) to expand the scope of private litigation through intervention, *Spangler v. United States*, 415 F.2d 1242, 1244-46 (9th Cir. 1969); and (2) to continue to seek class relief as an intervenor in a private action despite the absence of any class certification, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430-31 (1976). In short, the fact that such language was included in Section 902, but not in Section 706, demonstrates that the EEOC does not have the authority in its role as intervenor which the Solicitor General claims.

3. Like the Court below, the Solicitor General obfuscates the issue by his references to the EEOC's right to intervene in a private action. Thus: "Petitioners' construction of Title VII could also render the Commission's right to intervene a nullity" (Sol. Op. Cert. 11); and "Requiring the EEOC to exhaust the administrative process before filing a complaint in intervention could prevent the Commission from protecting the public interest in privately-initiated suits. . ." (Sol. Op. Cert. 11-12). However, as Petitioners noted in their certiorari petition, page 11, note 3, Petitioners are *not* challenging the EEOC's right to intervene in Hoffman's suit. Nor do Petitioners contend that the statutory administrative requirements which Petitioners rely on had to be completed before such intervention was allowed. Rather, Petitioners are contending that although the EEOC's intervention in Hoffman's suit may have been permissible, the mere fact that intervention was allowed is not adequate reason for ignoring the statutory dictates, and does not entitle the EEOC to don the mantle of class-wide representative without first conducting the appropriate investigation of Hoffman's class allega-

tions and without making a "reasonable cause" determination with respect to such allegations.[1]

4. The Solicitor General argues that "[r]etroactively limiting the claims that the EEOC may raise as an intervenor in a private action after the EEOC has devoted considerable time and resources to the case unreasonably wastes the Commission's limited resources to enforce Title VII" (Sol. Op. Cert. 8, n.5). Petitioners submit, however, that it is more in keeping with Congressional intent for the EEOC to channel its resources towards administratively investigating and attempting to obtain voluntary compliance before instituting suit, rather than seizing upon the totally unsubstantiated class allegations of a single individual as the boundaries for the EEOC's own suit in intervention and thereby imposing unnecessarily upon the equally limited resources of the judicial sys-

[1] When it sought intervention, the EEOC revealed no intention of taking over the role of class representative. Indeed, such an intention was seemingly disclaimed. For in support of its intervention motion, the EEOC represented to the District Court that its participation in Hoffman's case not only "could prove of assistance to the Court" with respect to "critical" aspects of on-going discovery, but stated in addition that because "the class has not yet been certified," "[t]he EEOC could also assist in the class delineation" (Pet. App. H, p. 50(a)). In these circumstances, the Solicitor General clearly misses the mark in commenting that the EEOC's "right to intervene is subject to the discretion of the district court," and that the latter court is empowered "to limit intervention in an appropriate case" (Sol. Op. Cert. 13). More to the point and appropriate would have been an admission by the Solicitor General that the EEOC's action in this case in claiming authority to seek class-wide relief was inconsistent with its earlier representation to the District Court in support of its intervention motion, and that the District Court may well have been misled thereby.

tem and Title VII defendants. Further, having chosen not to initiate its own direct action, the EEOC should not be heard to complain if the scope of the private plaintiff's action is subsequently narrowed. Finally, if the EEOC is dissatisfied with the ultimate scope of its suit in intervention, it may always initiate a separate action in its own right under either § 706 or § 707.

5. Hoffman, the private plaintiff, argues that because she "has exercised her statutory right to sue," litigation over the class claims being asserted by the EEOC "can no longer be avoided," and, thus, that there is no "purpose that would be served by the now inapplicable prerequisites to direct EEOC suit" (Hoff. Op. Cert. 8). The Solicitor General makes a similar contention (Sol. Op. Cert. 11). This argument, however, ignores Hoffman's present status in the litigation. Having failed to move for class certification pursuant to Rule 23, Hoffman may proceed solely on her personal claims. Thus, it is only as to those highly individualized claims (involving one facility, a single corporate defendant, and a time frame of less than two years) that litigation can no longer be avoided. As to the broad class claims that the EEOC now seeks to litigate independently of Hoffman, claims which involve some 38 additional defendants, another 400 facilities, and which extend over a ten-year period, litigation can and should be avoided until the EEOC complies with the statutory prerequisites to suit in its own right. *W.R. Grace & Company v. Local Union 759, supra*; *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977). As to these class claims, the Congressional objective of achieving voluntary compliance with EEO laws and affording

employers an opportunity to conciliate before litigating plainly applies.

Respectfully submitted,

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